

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOMBARDIER, INC.,

Plaintiff,

v.

MITSUBISHI AIRCRAFT CORPORATION,
MITSUBISHI AIRCRAFT CORPORATION
AMERICA INC., AEROSPACE TESTING
ENGINEERING & CERTIFICATION INC.,
MICHEL KORWIN-SZYMANOWSKI,
LAURUS BASSON, MARC-ANTOINE
DELARCHE, CINDY DORNÉVAL, KEITH
AYRE, AND JOHN AND/OR JANE DOES 1-
88,

Defendants.

NO. 2:18-cv-01543-JLR

**DEFENDANTS KEITH AYRE AND
MARC-ANTOINE DELARCHE'S
OPPOSITION TO BOMBARDIER
INC.'S MOTION TO SEAL THE
DECLARATION OF MICHAEL
BORFITZ AND EXHIBITS A, B, F-I,
K, AND L TO THE DECLARATION
OF JEFFREY DANLEY**

NOTED ON MOTION CALENDAR:
June 14, 2019

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

As noted in our recently filed reply regarding another motion to file under seal, we do not wish to inconvenience the Court with arguments regarding the merits of Bombardier's trade secret claims. For the most part, those claims are properly resolved on summary judgment or at trial. But no fact development or further analysis is necessary to resolve, and to reject, Bombardier's claims that the documents at issue here must be sealed. On their face these documents disclose that, with at most one exception, they merely cite or quote from publicly

1 available and easily accessible regulatory guidance that by its nature is confidential to no one.
 2 The one possible exception is a third-party vendor's specification document that conceivably
 3 might be proprietary to *that third party*, but is indisputably not Bombardier's own trade secret.

4 By redacting and designating information as its own trade secret that in fact is available
 5 to the public, Bombardier makes communications that would be innocent if revealed appear
 6 instead to be nefarious. And in the process it creates unnecessary motion practice that distracts
 7 the parties and the Court from the real issues in this case. We submit that the documents that
 8 are subject to Bombardier's instant motion to seal should be either unsealed or stricken from
 9 the record, and urge the Court to deny the motion for the reasons set forth herein.

10 **II. STATEMENT OF FACTS**

11 In response to the Court's May 1, 2019 order (ECF No. 144), Bombardier filed an
 12 Updated Motion for Preliminary Injunction against MITAC, Keith Ayre, and Marc-Antoine
 13 Delarche (ECF No. 146, hereafter the "Injunction Motion"). Defendants Ayre and Delarche
 14 opposed the Injunction Motion on May 13 (ECF No. 185 [re-filed redacted version], No. 187
 15 [re-filed sealed version], hereafter the "Injunction Opposition"), and Bombardier filed its reply
 16 on May 17 (ECF No. 192, hereafter "Injunction Reply"). Along with its Injunction Reply,
 17 Bombardier filed the redacted Declaration of Michael Borfitz (ECF No. 197) and the
 18 Declaration of Jeffrey E. Danley along with twelve associated exhibits, eight of which
 19 contained some level of redaction (ECF No. 196). At that time, Bombardier did not serve
 20 unredacted copies of the eight exhibits on Defendants Ayre and Delarche, or the other
 21 defendants, nor did it indicate that it planned to file unredacted versions.

22 On May 22, Defendants Ayre and Delarche filed a surreply to strike the Danley
 23 Exhibits and the Borfitz Declaration. (ECF No. 213.) The next day Bombardier's counsel
 24 stated that Bombardier planned to move to file under seal unredacted versions of the Danley
 25 Exhibits and the Borfitz Declaration. Bombardier filed its Motion to File Under Seal (ECF
 26 No. 215, hereafter the "Motion to Seal" or "Mot.") and also filed under seal unredacted copies
 27 of the Borfitz Declaration (ECF No. 217) and the eight redacted Danley Exhibits (ECF

No. 216). Bombardier served unredacted copies of those sealed filings on counsel for the MITAC and MITAC America and counsel for the AeroTEC defendants, but not on counsel for Defendants Ayre and Delarche.

III. ARGUMENT

None of the documents subject to Bombardier's Motion to Seal should be kept from the public. Bombardier has not followed this District's local rules for sealing, it has not attempted to satisfy the Ninth Circuit's controlling standard for sealing, and the documents it wishes to seal do not in fact satisfy that standard or any other definition of confidentiality.

A. Bombardier Has Not Attempted to Satisfy This District's Local Civil Rules or the Ninth Circuit's "Compelling Reason" Standard

This District's and the Ninth Circuit's requirements for filing papers in support of a dispositive motion are set forth in Defendants Ayre and Delarche's reply regarding the motion to seal portions of the Injunction Opposition and the Ayre Declaration. (ECF No. 231, at 2:12–25.) Contrary to those clear requirements, Bombardier has not provided a specific statement of the reasons for keeping the Danley Exhibits and the Borfitz Declaration under seal. *See* LCR 5(g)(3)(B). There is nothing specific about its assertion that the documents Bombardier wishes to seal "either contain or describe Bombardier confidential and/or proprietary trade secret information that is the subject of this trade secret misappropriation suit." (Mot. at 3:14–16.) Likewise, the Motion to Seal lumps together six of the Danley Exhibits—emails Mr. Ayre allegedly sent from his work email address to his personal email address—and asserts that they "disclose and describe Bombardier confidential and/or trade secret information." (*Id.* at 3:24–26.) Such vague contentions are not sufficient under Local Civil Rule 5(g).

Nor do such statements come close to satisfying the controlling Ninth Circuit standard, under which the proponent of sealing is "required to present 'articulable facts' identifying the interests favoring continued secrecy, and to show that these specific interests overc[o]me the presumption of access by outweighing the 'public interest in understanding the judicial process.'" *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1181 (9th Cir. 2006),

1 quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003) (internal
2 citation omitted). There are no such articulable facts in the Motion to Seal.

3 Nor does the Borfitz Declaration support sealing. For the most part, that declaration
4 attempts to connect certain of the Danley Exhibits to Mr. Ayre’s draft statement of work for a
5 potential position at MITAC. (*Cf.* FAC Ex. S, at 5–6.) For some, but not all, of those exhibits,
6 Mr. Borfitz also asserts that certain information an exhibit contains would be value to a
7 Bombardier competitor. None of these statements are supported.

8 **B. On Their Face, None of the Danley Exhibits, or the Borfitz Declaration, Should Be**
9 **Sealed**

10 The information Bombardier wishes to seal from the Danley Exhibits and the Borfitz
11 Declaration is either publicly available or not confidential to Bombardier, as described below.
12 Plaintiff’s two-and-one-half-page Motion to Seal does not attempt to explain why such public
13 or third-party information should be sealed from public view.

14 In other filings with the Court, Bombardier has taken the position that otherwise publicly
15 available information can be filed under seal in this case because “[t]his Court has recognized
16 that ‘a trade secret may consist of data, public sources or a combination of proprietary and
17 public sources.’” (ECF No. 227, at 3:25–27, quoting ECF No. 111, at 9, 15.) The Court quoted
18 the foregoing language from the Ninth Circuit’s decision in *United States v. Nosal*, 844 F.3d
19 1024, 1042 (9th Cir. 2016). (ECF No. 111, at 9:19–10:1.) The Ninth Circuit observed in that
20 case that “[i]t is well recognized that it is the secrecy of the claimed trade secret as a whole that
21 is determinative.” *Nosal*, 844 F.3d at 1042, quoting RESTATEMENT (THIRD) OF UNFAIR
22 COMPETITION § 39 cmt. f (1995). The “compilation” doctrine is thus inapplicable to any
23 individual, publicly available item that may be part of the compilation; it is the *compilation* “as
24 a whole” that can be a trade secret—if and provided that it meets the requisites required of such
25 compilations—not individual components when not part of that whole.

26 Further, even if the separate, publicly available item did become secret by being part of
27 a secret compilation, Bombardier here has not articulated what secret compilation any

1 particular publicly available document is a part of or explained how such compilation is unique
 2 or how it was compiled, nor has Bombardier provided any of the other information necessary to
 3 make a trade secret claim based on a compilation theory.

4 While Bombardier's Motion to Seal is not the occasion to litigate the merits of
 5 Bombardier's underlying trade secret claims, this District's local rules require some
 6 explanation of the legitimate private or public interests that warrant sealing. LCR 5(g)(3)(B).
 7 Where, as here, the plaintiff grounds its motion to seal on a claim that the material in question
 8 constitutes a trade secret, it must make some showing beyond mere ipse dixit, otherwise the
 9 District's rules and the Ninth Circuit's precedent mean nothing. But Bombardier has declined
 10 to make anything beyond conclusory arguments. Moreover, the Court need not hold a mini-
 11 trial to decide that the Danley Exhibits and the Borfitz Declaration are not properly sealed:
 12 those materials on their face disclose that they cannot be Bombardier's trade secrets.

13 **1. Exhibit A: 2013 email from Transport Canada.**

14 Nothing in this email is confidential to Bombardier, let alone a trade secret. Plaintiff
 15 seeks to seal from public view information that itself has disclosed in this litigation, the identity
 16 of a publicly available and easily locatable FAA regulatory guidance, and the names of
 17 products manufactured by third parties. There is no legitimate interest warranting the
 18 redactions made to this email, and Bombardier cannot show that any injury will result from
 19 unsealing the unredacted version.¹

20 Much of the redacted and sealed information in this email is actually revealed and
 21 stated in Bombardier's own public filings in this case. For instance, the face of the redacted
 22 2013 email states: "[REDACTED] guidance does allow for the use of other acceptable
 23 [REDACTED] to those that are specifically identified in the AC." (Redacted Ex. A.) "[T]he
 24
 25

26 ¹ Exhibit A is the same email that is heavily redacted in Exhibit S to the FAC and discussed in the Injunction
 27 Opposition (at 5:9–6:6, 16:3–21, 18:6–8), and the reply regarding the motion to seal the Injunction Opposition and
 the Ayre Declaration (ECF No. 231, at 3–6).

1 AC” refers to a particular FAA advisory circular, which is publicly available on the FAA’s
2 website. (Injunction Opposition [filed under seal: ECF No. 187], at 5:15–16 & n.1.)²

3 Bombardier also discloses in its FAC that the referenced email “concern[s] smoke
4 penetration testing for Bombardier aircraft” (FAC ¶ 77), a description of the email that appears
5 repeatedly in Bombardier’s public filings (*e.g.*, ECF No. 146, at 6:11; No. 228, at 4:17–18).
6 But Bombardier has redacted the phrase “smoke penetration testing” from Exhibit A every time
7 it appears. Bombardier also redacts from Exhibit A every mention of the type of equipment
8 being discussed, so Bombardier apparently views the type of equipment that is used in smoke-
9 penetration testing and which is explicitly discussed in the FAA’s 1994 advisory circular not
10 only to be a trade secret, but somehow to be *its* trade secret. Indeed, the name of one of the two
11 models of that equipment mentioned in the email is contained in that advisory circular, but
12 Bombardier redacts that information too. Even the brand and model of the equipment
13 Bombardier proposes using in the alternative to that mentioned in the advisory circular is not
14 Bombardier’s trade secret. Does Bombardier truly claim as secret the identity of equipment it
15 uses in *safety* testing? Bombardier has not attempted to show that the rest of the industry does
16 not already use this same equipment, much less that it doesn’t know of it.

17 Indeed, Bombardier even wishes to keep secret the identity of the FAA’s publicly
18 available regulatory guidance, which is cited in the unredacted Exhibit A. Bombardier
19 contends in one of its other filings that it does not matter that the cited FAA guidance is 25
20 years old and publicly available, because it is part of a trade secret compilation. (ECF No. 227,
21 at 3:25–27.) As set forth above, this doctrine does not apply to a single regulatory guidance,
22 discussed in isolation. There is no identifiable “compilation” here.

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24
25 ² Bombardier implies in its Response regarding the motion to seal the Injunction Opposition and the Ayre
26 Declaration that it inadvertently made the discussed disclosures in its own public filings. (ECF No. 227, at 3:13–
27 17.) This should be disregarded, not least because Bombardier has failed to address the purported inadvertent
disclosure. If Bombardier views its publicly filed descriptions of redacted portions of the 2013 email as
inadvertent disclosures of its trade secret information, then it should have moved to seal all of its previous public
filings containing those “inadvertent disclosures.” It has not done so.

Furthermore, a trade secret must be both “not... generally known” and “not... readily ascertainable by proper means.” 18 U.S.C. § 1839(3)(B). It is readily ascertainable that to certify its aircraft Bombardier relied on at least Part 25 of the Federal Aviation Regulations (14 C.F.R. Part 25)³—which contains airworthiness standards for transport category aircraft (FAC ¶ 34)—and the FAA’s advisory circulars regarding those regulations,⁴ all of which have an “AC number” beginning with “25-”, just like the advisory circular that Bombardier contends is its trade secret. Relatedly, the identity of that advisory circular can be “reverse engineered,” 18 U.S.C. § 1839(6)(B), from Bombardier’s own public descriptions of this email by typing “faa smoke penetration regulations” into an internet search engine. The ease with which this information can be identified shows not only that it is not Bombardier’s trade secret, but also that its disclosure could not possibly injure Bombardier.

Indeed, the Motion to Seal hardly bothers to argue why this email should be sealed. It just applies to this exhibit the same “confidential and/or trade secret information” assertion it applies to all of the documents subject to the Motion. Concerning this exhibit, the Borfitz Declaration states that “[d]ialogue such as this between a regulatory agency official and an aircraft company, discussing particular steps that may or may not be taken to ensure compliance with regulations, is typically treated as confidential and it is generally understood on both sides that the information will not be disclosed or otherwise disseminated.” (Borfitz Decl. ¶ 12.) This assertion is not tied to this particular email, nor does it address that this email is now almost six years old. Mr. Borfitz’s conclusory assertion that the email would “provide valuable information for other potential competitors of Bombardier” is not explained. (*Id.*)

2. Exhibit B: FAA website search results.

Bombardier apparently redacted the FAA website search results because they reflect the brand or model name of the equipment discussed in the 2013 Transport Canada email. (*See*

³ < <https://www.govinfo.gov/app/details/CFR-2018-title14-vol1/CFR-2018-title14-vol1-part25>>

⁴ <https://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document/list/parentTopicID/105>

1 ECF No. 192, at 3:11–15.) For the same reasons Exhibit A should not be sealed, neither should
 2 Exhibit B.

3 **3. Exhibit F: 2014 “Ducted Smoke Det Spec” email.**

4 Like Exhibit A, Exhibit F cannot be considered a trade secret “compilation,” because it
 5 is an email attaching a single document created by a third party and describing that third party’s
 6 product. That document conceivably could be confidential to the third party, but not to
 7 Bombardier.

8 The redacted version of the 2014 email in Exhibit F shows that the email attaches a PDF
 9 file named <R-7748_-G Ducted Smoke Det_Soft Reqt Spec.pdf>. The PDF attachment is a 41-
 10 page-long document, all of which is redacted from the publicly filed version of the exhibit.
 11 That document, which has a 2010 copyright date, is titled “R-7748 / Software Requirements
 12 Specifications (SRS) / Model [] Ducted Smoke Detector,” all of which is indicated by the
 13 unredacted file name of the PDF.⁵ The document was created and published by the third-party
 14 vendor that manufactures the smoke detector described in the document. The email itself
 15 contains an image of a portion of that PDF, which is redacted from the publicly filed version of
 16 the exhibit. The information in the image appears on page 29 of 41 of the PDF document.

17 This third party’s specification document, existing by itself and not even arguably as a
 18 “compilation,” is not Bombardier’s trade secret or otherwise confidential or proprietary to
 19 Bombardier. *See Nosal*, 844 F.3d at 1042. The only reason to file it under seal would be to
 20 protect the *third party’s* confidential information. But since Bombardier does not mention the
 21 Software Requirements Specifications document in its Reply, there is no reason for it to have
 22 been filed in the first place. Exhibit F should be unsealed, or stricken from the record.

23 **4. Exhibit G: “SSA analysis” email.**

24 This exhibit, which is almost entirely redacted, appears based on its “sent” time to be
 25 the same email MITAC submitted in unredacted form as Exhibit C to the Riedinger

26
 27 ⁵ We leave out the manufacturer and model number of the smoke detector in order to not disclose information that Bombardier may, however incorrectly, consider confidential.

1 Declaration. Exhibit G was referred to in Bombardier’s FAC (¶ 79) and in its Injunction
 2 Motion (at 6:12–13). In order for information to receive statutory trade secret protection, the
 3 proponent must show that it has “taken reasonable measures to keep such information secret.”
 4 18 U.S.C. § 1839(3)(A).

5 As set forth in the May 13 Riedinger Declaration (ECF No. 166 ¶¶ 3, 4 & Ex. B) and
 6 the May 31 Riedinger Declaration (ECF No. 224, including its exhibits), Bombardier disclosed
 7 this email to counsel for MITAC without any confidentiality designation, despite the fact that
 8 on its face it is a document that describes a Bombardier aircraft. Bombardier has not stated
 9 what, if anything, it did to determine whether this email contained its own trade secrets before
 10 it disclosed it to opposing counsel without any confidentiality designation. Such nonchalance
 11 is incompatible with the claim that this document contains any Bombardier trade secret. And
 12 Bombardier’s backpedaling now to assert “attorneys’ eyes only” protection over the document
 13 is an abuse of the stipulated protective order.

14 Moreover, Bombardier’s Motion to Seal does not state what information in this
 15 Exhibit G it argues is its trade secret. But based on its redactions, Bombardier apparently
 16 believes every word in the email qualifies for trade secret protection, including the name
 17 “Frederic,” which Bombardier disclosed in its own pleading. (FAC ¶ 79.) Such over-redaction
 18 flouts Local Rule 5(g)’s direction that parties minimize filings under seal.

19 **5. Exhibit H: “Supplier CID” email.**

20 As with Exhibit A, the information redacted from this exhibit is publicly available and
 21 not arguably part of any secret compilation. This exhibit is a forwarded October 15, 2015
 22 email from Damien Toulouse to Mr. Ayre and two other people, all apparently Bombardier
 23 employees. The copy of this exhibit that Bombardier filed on the public docket for this case
 24 contains a large block redaction. A portion of that redaction is what appears to be an image
 25 that was pasted into the email. The image states requirements for “CIDs,” and it contains what
 26 appears to be an identification code associated with those requirements. An internet search for
 27 that code returns, as the first result, a Wikipedia article describing guidance issued by SAE

International, which is a U.S.-based professional association and standards developing organization for engineering professionals in various industries, including aerospace. The Wikipedia article contains a link to SAE International's website, where the referenced guidance is available for sale to the general public. The Wikipedia article also states that the FAA recognized this guidance in an advisory circular published in 2011, and gives that guidance's "AC" number. A search for that number on the FAA's website⁶ returns the publicly available copy of the referenced advisory circular. Thus, for the same reasons Exhibit A is not properly filed under seal, neither is Exhibit H.

6. Exhibit I: Keith Ayre email log.

On page 1 of 17 of this document, Bombardier has redacted part of the subject of the forwarded 2013 Transport Canada email contained in Exhibit A, described above. For the same reasons Exhibit A should not be sealed, neither should Exhibit I.

7. Exhibit K: "Technical Knowledge gaps" email.

The unredacted portions of this exhibit show that it is an email chain between Mr. Ayre and another Bombardier engineer, Danilo Verrelli, from March and June 2015. Mr. Ayre had requested that Mr. Verrelli and certain other senior engineers at Bombardier identify gaps in knowledge at Bombardier "in the Pneumatics knowledge domain." (Ex. K, at 3.) According to the Borfitz Declaration, the redacted portions of the exhibit "identifies specific gaps in knowledge and experience" at Bombardier, "such as understanding leak detection within pneumatic systems." (Borfitz Decl. ¶ 8.) Bombardier's Motion to Seal gives no reason why the existence of knowledge gaps at Bombardier is a trade secret. Mr. Borfitz states in his declaration that "[c]ompetitors could use that information to target specific individuals for hiring and capitalize on recruitment efforts within a limited pool of qualified engineers." (*Id.*) This makes little sense: Neither Mr. Borfitz nor Bombardier describes how a competitor's

⁶ <https://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/>

1 having information about gaps in knowledge at Bombardier would help that competitor's own
2 recruiting efforts or otherwise provide it with value.

3 **8. Exhibit L: "FAA Policy" email.**

4 Like Exhibits A and H, Exhibit L is another example of Bombardier's redaction of
5 publicly available information to give it the aura of confidentiality. Indeed, nearly the entirety
6 of Exhibit L is redacted. The last line of the email above the signature block contains what
7 appears to be an identification code, which has been redacted from the publicly filed exhibit.
8 An internet search for that code returns, as the first result, a PDF of a 2006 FAA memorandum,
9 posted on the FAA's website.⁷ This memorandum has a "Memo No." that is identical to the
10 identification code in Exhibit L. The unredacted Exhibit L contains language in red under the
11 line that starts, "This is what we will be fighting against." That language in red appears,
12 exactly and in full, in the above-referenced 2006 FAA memorandum at page 7. The language
13 of government regulations and the publicly available documents concerning them cannot,
14 standing alone, be anyone's trade secret and have no business being filed under seal.

15 **IV. CONCLUSION**

16 For the reasons set forth herein, the unredacted Borfitz Declaration (ECF No. 217) and
17 all of the unredacted Danley Exhibits (ECF No. 216) should be unsealed or stricken from the
18 record.

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27 ⁷ <http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgPolicy.nsf/>

1 DATED: June 10, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 10, 2019 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 10th day of June, 2019 at Seattle, Washington.


Gabriella Sanders